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Supreme Court, U. S.  
**F I L E D**  
**JUL 16 1997**  
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No. 96 - 1923

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

EDWARD S. COHEN,

*Petitioner,*

v.

HILDA DE LA CRUZ; NELFO C. JIMENEZ;  
MARIA MORALES; GLORIA SANDOVAL;  
HECTOR SANTIAGO; SANTIA SANTOS; ELBA  
SARAVIA; ELVIA SIGUENZIA; ENILDA TIRADO,

*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Third Circuit**

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**REPLY OF THE PETITIONER**

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## REPLY OF THE PETITIONER

Respondents essentially concede that the question presented in this case merits review in this Court. Before the court of appeals and the district court, respondents acknowledged the square conflict in the circuits. (Resp. C.A. Br. 19; Resp. Dist. Ct. Br. 25). Here they agree that "[t]he extent to which punitive damages awarded on account of fraud are dischargeable in Bankruptcy is an important issue which has divided the Courts of Appeal[s]." (Opp. 2). Not only is there a split between the courts of appeals (Pet. App. 8a (expressly rejecting *In re Levy*, 951 F.2d 196 (9th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992), and adopting *In re St. Laurent*, 991 F.2d 672 (11th Cir. 1993))), but as the petition for certiorari demonstrated, the bankruptcy and district courts are sharply divided as well. (Pet. 10-14). Given the extent of this longstanding conflict over the proper construction of § 523(a)(2)(A), this Court should grant certiorari to provide the "uniform Laws on the subject of Bankruptcies throughout the United States" that the Constitution envisions. U.S. Const. art. I, § 8, cl. 4. (See Pet. 13).

Respondents nonetheless maintain that this "Court should not utilize this case to resolve the important issue presented" (Opp. 4) because "the extent to which the damages awarded below are 'punitive' is unclear" (Opp. 2). Respondents' argument rests on two premises, neither of which was accepted by the courts below: (1) that petitioner seeks to discharge all of the damages imposed by the bankruptcy court, not merely the non-compensatory portion of the treble damages award, and (2) that the lower courts are divided only on the discharge of common law punitive damages, as opposed to statutory treble damages. Both premises are erroneous.

First, respondents simply misunderstand the nature of the legal claim in this case: petitioner seeks to discharge only "punitive" damages. The bankruptcy court in this case trebled, pursuant to the New Jersey Consumer Protection Act, the \$31,382.50 in rent overcharges paid by respondents to set a total award of \$94,147.50. (Pet App. 39a, 54a). Petitioner seeks to discharge the \$62,765 differential between those two amounts. That differential is unquestionably punitive, and the court of appeals

assumed as much. (Pet. App. 6a n.2). As New Jersey's intermediate appellate court explained when addressing a trebled \$5,000 award under the very statute at issue in this case, "\$5,000 of the \$15,000 award represents compensatory damages and the remaining \$10,000 represents the punitive aspect." *Neveroski v. Blair*, 358 A.2d 473, 482 (N.J. Super. Ct. App. Div. 1976). Even the case cited by respondents, *Cox v. Sears Roebuck & Co.*, explains that "by awarding a victim treble damages," the Consumer Fraud Act "punishes the wrongdoer." 647 A.2d 454, 463 (N.J. 1994).<sup>1</sup> Because the \$62,765 differential at issue in this case constitutes "punitive damages awarded on account of fraud" (Opp. 2), and respondents agree that the dischargeability of such damages "is an important issue which has divided the Courts of Appeal[s]" (*id.*), the petition for certiorari should be granted.

Second, petitioner is not aware of any decision under § 523(a)(2)(A) that draws the distinction that respondents suggest between common law punitive damages and statutory treble damages. Instead, as the cases cited in the petition make clear, the division in the lower courts extends to all non-compensatory damages. For example, in *In re Markarian*, 208 Bankr. 249, 253 (1st Cir. B.A.P. 1997), the Bankruptcy Appellate Panel of the First Circuit expressly sided with Judge Greenberg's dissent in this case when it recently held that statutorily imposed treble damages under the federal RICO statute are dischargeable under § 523(a)(2)(A). Similarly, *In re Bozzano*, 173 B.R. 990, 997-98

<sup>1</sup> The passage from *Cox* cited by respondents and the majority below (Opp. 3 (citing Pet. App. 6 n.2)) acknowledges a compensatory purpose only for the Act's "provision for attorneys' fees," 647 A.2d at 465, not the treble damages provision. See also *Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566, 569 (N.J. 1978) (statutory provision that "the court shall \* \* \* award three-fold the damages sustained" "is a punitive measure") (quotation omitted); *Pierzga v. Ohio Cas. Group*, 504 A.2d 1200, 1203 (N.J. Super. Ct. App. Div. 1986) ("clearly a punitive remedy"); *49 Prospect St. Tenants Ass'n v. Sheva Gardens*, 547 A.2d 1134, 1151 (N.J. Super. Ct. App. Div. 1988) ("a punitive recovery").

(Bankr. M.D.N.C. 1994), and *In re Stokes*, 150 B.R. 388, 391 (W.D. Tex. 1992), *aff'd on other grounds*, 995 F.2d 76 (5th Cir. 1993), recognized that statutory treble damages respectively under North Carolina's and Texas's Unfair and Deceptive Trade Practices Acts are dischargeable under § 523(a)(2)(A).<sup>2</sup> Because the lower courts are divided on the dischargeability of all non-compensatory damages, without regard to whether they are common law punitive damages or instead statutorily imposed treble damages, the petition for certiorari should be granted.

In any event, certiorari is warranted because the damages at issue here were not "obtained" by petitioner, as required by § 523(a)(2)(A), whether or not they satisfy respondents' definition of "purely punitive damages." (Opp. 4). As creditors opposing discharge under § 523(a)(2)(A), respondents must establish that petitioner "obtained" the non-compensatory portion of the treble damages award "by . . . fraud." 11 U.S.C. § 523(a)(2)(A). Given the plain meaning of "obtained," the majority of courts hold, in conflict with the ruling below, that § 523(a)(2)(A) bars discharge of only monies the debtor actually "came into possession of." (Pet. 6, 10). Here, there is no question that petitioner never "came into possession of" the additional \$62,765 award imposed by the bankruptcy court over and above respondents' compensatory damages, and under the majority rule that award would be dischargeable.

Finally, contrary to respondents' assertions, the fact that the bankruptcy court raised the issue of dischargeability *sua sponte* in this case in no way "would support denial of the writ" (Opp. 4). Review in this Court is appropriate so long as the question

<sup>2</sup> Accord *In re Thrall*, 196 B.R. 959, 967 (Bankr. D. Colo. 1996) ("Because the measure of the nondischargeable debt under § 523(a)(2)(A) is limited to that 'obtained by fraud', interest, attorney fees, punitive and treble damages are not included.") (citation omitted). As the opinion in *Thrall* demonstrates, if petitioner prevails in this case he may also be entitled to discharge of attorneys' fees awarded under the Consumer Protection Act.

presented "was 'pressed [in] or passed on' by the Court of Appeals." *United States v. Wells*, 117 S. Ct. 921, 926 (1997) (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992)) (alteration in *Wells*); accord *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991). Here, the parties briefed the issue of discharge under § 523(a)(2)(A) in both the district court and the court of appeals, and respondents concede that they have not been in any way prejudiced by the course of the proceedings. (Opp. 4; see also Pet. App. 33a (express ruling of the district court that "the debtor has not waived this argument"))).

### CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 16, 1997

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